



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 83 OF 2017

In the matter of an application by Atul R. Shah for orders of *Mandamus*

and

In the matter of Article 47 of the Constitution & the Fair Administration Act

and

In the matter of Order 53 of the Civil Procedure Rules, 2010

and

In the matter sections 46 and 50 of the Kenya Deposit Insurance Act, Chapter 487C

BETWEEN

Republic.....Applicant

-versus-

The Receiver Manager, Imperial Bank Limited

(In Receivership).....Respondent

and

Atul R. Shah.....*Ex parte* Applicant

JUDGMENT

The parties.

1. The *ex parte* applicant is a fixed deposit accounts holder with Imperial Bank Limited (In Receivership). The Respondent is the Receiver Manager of Imperial Bank Limited (In Receivership).

The relief sought.

2. By way of a Notice of Motion dated 3rd March 2017, the *ex parte* applicant seeks the following Judicial Review Orders against the Respondent:-

a. **That** an order of **Mandamus** compelling and directing the Respondent to make payment to the *ex parte* applicant in sum of **Ksh. 15,000,000.00** from the sums held in his fixed accounts with Imperial Bank Limited (In Receivership) within (7) days, which sum is made out as follows:-

- i. Ksh. 2,500,000.00 on fixed deposit account FDR No. 003DEP3150200004;
- ii. Ksh. 2,500,000.00 on fixed deposit account FDR No. 003DEP31431600006;
- iii. Ksh. 2,500,000.00 on fixed deposit account FDR No. 003DEP31506100008;
- iv. Ksh. 2,500,000.00 on fixed deposit account FDR No. 003DEP31424800004;
- v. Ksh. 2,500,000.00 on fixed deposit account FDR No. 003DEP31524700005;
- vi. Ksh. 2,500,000.00 on fixed deposit account FDR No. 003DEP31516700003;

b. **That** an order of **Mandamus** compelling and directing the Respondent to make payment to the ex parte applicant in the sum of **Ksh. 18,927,161.98** being **10%** of the deposits of the remaining sums held in his fixed deposit accounts with Imperial Bank Limited (In receivership) within seven (**7**) days, which sum is made out as follows:-

- i. Ksh. 350,949.99 on fixed deposit account FDR No. 003DEP3150200004;
- ii. Ksh. 2,263,334.56 on fixed deposit account FDR No. 003DEP31431600006;
- iii. Ksh. 273,582.66 on fixed deposit account FDR No. 003DEP31506100008;
- iv. Ksh. 15,374,142.75 on fixed deposit account FDR No. 003DEP31424800004;
- v. Ksh. 250,000.00 on fixed deposit account FDR No. 003DEP31524700005; and
- vi. Ksh. 415,152.0 on fixed deposit account FDR No. 003DEP31516700003;

c. **That** the costs of and incidental to this suit be awarded to the ex parte applicant.

Factual matrix.

3. It is common ground that the ex parte Applicant is the holder of Fixed Deposit Accounts with the Bank for which he was issued with Fixed Deposit Receipts as follows:-

- i. FDR No. 003DEP3150200004 issued on 17th July 2015 maturing on 16th October 2015 in the sum of Ksh. 6,009,499.95;
- ii. FDR No. 003DEP3143160006 issued on 12th August 2015 maturing on 11th November 2015 in the sum of Ksh. 25,133,345.63;
- iii. FRD No. 003DEP3150610008 issued on 31st August 2015 maturing on 30th November 2015 in the sum of Ksh. 5,235,826.60;
- iv. FRD No. 003DEP314248004 issued on 2nd September 2015 maturing on 2nd December 2015 in the sum of Ksh. 156,241,427.53;
- v. FRD No. 003DEP3152470005 issued on 4th September 2015 maturing on 4th December 2015 in the sum of Ksh. 5,000,000.00;
- vi. FRD No. 003DEP3151670003 issued on 15th September 2015 maturing on 15th December 2015 in the sum of Ksh. 6,651,521.23.

4. It is also uncontested that following the declaration of the initial phase of payouts for amounts not exceeding **Kshs. 1,000,000.00**, the applicant applied for the payment on deposits in his fixed deposit accounts through DTB Limited and submitted all the required documents, and, that, the Respondent approved a payment of **Ksh. 1,000,000.00** on all the applicant's deposits.

5. The ex parte applicant avers that during the second phase of payouts to depositors for amounts not exceeding **Ksh. 1,500,000.00** which commenced on or about 27th July 2016, he once again submitted his request for payment on deposits in his savings and fixed deposit accounts through NIC Bank Limited, but, the Respondent declined to make payments to him on grounds that he was a guarantor for an overdraft facility advanced to African Retail Traders (2005) Limited since he signed a letter of offer dated 24th December 2009 on behalf of the said company. However, the ex parte applicant avers that he was not a guarantor to the said company.

6. He further avers that he wrote to the Respondent through his advocate on 19th December 2016 requesting it to discharge its statutory mandate and pay him **Ksh. 15,000,000.00** being the amount due during the first and second phase of payouts to depositors as particularized in paragraph 3 (a) above, but despite the said request, the Respondent has failed, and or refused to discharge its statutory mandate thereby denying him his funds held by the Respondent.

7. The ex parte applicant further avers that on 28th December 2016, the Kenya Deposit Insurance Corporation announced a further payment

of sums of up to **10%** of the current deposits of the Respondent's verified depositors subject to a minimum of **Ksh. 200,000.00**, but, the Respondent has failed and or refused to disburse **10%** of the deposits in his fixed deposit accounts amounting to **Ksh. 18,927,161.98** with no reasons being advanced for the same.

Legal foundation of the application.

8. The legal grounds relied upon by the ex parte applicant are that the Respondent is under a statutory mandate under section **50** of the Kenya Deposit Insurance Act^[1](herein after referred to as the Act) to make payments in respect of any insured deposit without discrimination where it is appointed as a Receiver. He further states that failure to make the said payment of **Ksh. 15,000,000.00** on the alleged grounds that the ex parte applicant was a guarantor to African Retail Trader (2005) Limited when no Deed of Guarantee existed and failure to pay **10%** of the remaining deposits in his fixed deposit accounts amounting to **Ksh. 18,927,161.98** is unreasonable, irrational and unlawful and an abuse of its statutory mandate under the above section.

9. Further, the ex parte applicant states that as a consequence of the Respondent's failure to perform its statutory duty, he has been denied a portion of his deposits which he is entitled to as a matter of right, and, that, unless the orders of Mandamus are granted, the Respondent will continue unabated in its refusal to carry out its statutory duty to make the payment, and that, the failure is ultra vires the Respondent's statutory mandate.

Respondent's Replying Affidavit.

10. **Andrew Wamicwe**, the Respondent's Legal counsel in his Replying Affidavit dated **4th** November 2017 averred that a casual look at exhibit **ARS 2** at page 7 annexed to the ex parte applicant's application shows that the ex parte applicant signed a letter of offer dated **24th** December 2009 undertaking to give a personal guarantee for **Ksh. 60,000,000/=** in favour of the Respondent. He further averred that under clause **10** thereof, the securities to be held were the personal guarantees and indemnity (joint and several) to the tune of **Ksh. 60,000,000/=** guaranteeing the directors of African Retail Traders, namely, **Mohamed Farid, Sultan Karim, Abdulla Amny, Atul R. Shah** and **Amool J.K Nathwani**. He further averred that despite the directors undertaking to sign personal guarantees in favour of the Respondent, they declined, and, that, the undertaking given on **24th** December 2009 by the said directors still stands.

11. **Mr. Wamicwe** also averred that African Retail Traders owes the Bank over **Ksh. 140,000,000/=**, hence, it will be unjust and unfair to the other depositors if the ex parte applicant is paid the sums claimed herein unless the issue of the ex parte applicant and the dishonored guarantee to African Retail Traders for **Ksh. 60,000,000/=** is explained. He also averred that Judicial Review orders are discretionary and that the ex parte applicant does not deserve this court's discretion.

Ex parte Applicant's further Affidavit.

12. **Mr. Atul R. Shah** swore the further Affidavit dated **5th** December 2017. He averred that he did not sign neither did he undertake to give a personal guarantee for **Ksh. 60,000,000/=** in favour of the Respondent for the loan advanced to African Retail Traders Limited. He also averred that the Respondent has not produced evidence of any signed and or registered Deed of Guarantee. Further, he averred that such undertakings must be in writing. He also averred that annexure **ARS2** to his verifying Affidavit is not and was not intended to be a personal guarantee by himself or any of the persons listed therein and that a Deed of Guarantee had to be executed to bind him as a guarantor. He also averred that without prejudice to the above, he is not personally liable to repay any monies owed to the said Respondent by the said company since he did not execute a personal guarantee to secure the loan to the company from the Respondent.

13. **Mr. Shah** further averred that in absence of a Deed of Guarantee executed by himself, the allegation of a dishonored guarantee has no basis and that a guarantee cannot be enforced by way of Judicial Review proceedings and that the Bank's claim (if any) has been extinguished by dint of section **4(a)** of the Limitation of Actions Act.^[2]

Issues for determination.

14. Upon analyzing the facts presented by the parties, I find that only one issue falls for determination, namely:- **whether the ex parte applicant has established any grounds for this court to grant the orders of Mandamus sought.**

15. The crux of the ex parte applicant's advocates' submissions is that the Respondent acted *ultra vires* section **50** of the Act by refusing to pay the ex parte applicant on grounds that the ex parte applicant was a guarantor for an overdraft facility advanced to African Retail Trader (2005) Limited, yet no Deed of Guarantee exists. Citing the definition of a guarantee in Volume **20** of the *Halsbury's Laws of England*^[3] and *Kolaba Enterprises Limited v Shanshudin Hussein Varvani & Another*^[4] in which the court defined a guarantee as a separate contract, he submitted that a guarantee must as of necessity be in writing.^[5] Further, he argued that clause **10** of exhibit **ARS 2** annexed to the ex parte applicant's verifying Affidavit is not and was not intended to be a guarantee. Also, argued that the Respondent never provided evidence of the existence of the said guarantee. Counsel further submitted that a guarantee cannot be enforced by way of judicial review proceedings, hence, the Respondent's refusal to pay is *ultra vires* its statutory mandate and a violation of section **4** of the Fair Administrative Action Act.^[6]

16. The Respondent's counsel submitted that *Mandamus* lies when officials have a public duty to perform, and have refused to perform.^[7] He submitted that the proviso to section **50(2)** of the act allows the Respondent to offset deposits against loans and debts owed by the depositor to the institution, hence, the ex parte applicant's application is based on the misapprehension of the law.

17. Counsel referred to Rule **37 (3)** of Act which provides that "No action shall be taken against the Corporation in respect of the obligation of the Corporation to make payment in relation to an insured deposit unless the action is commenced within six years after the date of appointment of the corporation as liquidator of the institution in which the deposit is held" and argued that this suit is pre-mature. He also argued that the Respondent is an institution under receivership and not liquidation, and, that, the statutory duty to pay insured deposits is yet

to accrue, and, that, these proceedings are a misapprehension of the law.

18. Further, counsel argued that under section 36 of the Act, the Receiver may, where it deems it necessary, withhold payment to a third party in respect of any deposit with an institution until it has received an assignment in writing of all the rights and interests of the depositor in relation to the deposit. Additionally, he argued that in the event insured deposits are due, section 33(7) of the Act provides that the corporation shall offset and withhold payment of such portion of the insured deposit of any depositor in an institution against any loans or debts due and owing by that depositor to the institution or against any claims for injuries or losses through negligence or other wrongdoing against any depositor who may be liable to the institution or the corporation as a director, shareholder, officer, employee, agent or other person.

19. Lastly, he submitted that the *ex parte* applicant together with his fellow directors listed above are guarantors to the **Ksh. 60,000,000** owed to the Respondent and argued that by executing the letter of offer, the *ex parte* applicant agreed to the existence of the personal guarantee. He urged the court to be guided by the principle of equity which regards as done that which ought to be done.^[8]

20. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.^[9] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.^[10]

21. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**^[11]

22. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

23. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *Mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,^[12] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[13] The eight factors that must be present for the writ to issue are:-

(i) *There must be a public legal duty to act;*

(ii) *The duty must be owed to the Applicants;*

(iii) *There must be a clear right to the performance of that duty, meaning that:*

a. *The Applicants have satisfied all conditions precedent; and*

b. *There must have been:*

I. *A prior demand for performance;*

II. *A reasonable time to comply with the demand, unless there was outright refusal; and*

III. *An express refusal, or an implied refusal through unreasonable delay;*

(iv) *No other adequate remedy is available to the Applicants;*

(v) *The Order sought must be of some practical value or effect;*

(vi) *There is no equitable bar to the relief sought;*

(vii) *On a balance of convenience, mandamus should lie.*

24. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. For *Mandamus* to issue, there must be a public legal duty to act and the duty must be owed to the Applicant. There must be a clear right to the performance of that duty, meaning that the Applicant has satisfied all conditions precedent. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay.

25. The question that begs for an answer is whether the *ex parte* applicant has demonstrated the existence of the legal duty to act on the part of the Respondent. The Respondent's counsel has invoked the provisions of the proviso to section 50 (2)(a) of the Act. The Respondent has stated clearly that there exists a debt and cited the said guarantee. This is a contested issue of fact which cannot be determined in a Judicial Review proceeding. The proviso to the above section raises serious doubts as to whether a legal right exists to be enforced by way of *Mandamus*. The proviso reads that:- "Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution."

26. The Respondent's counsel also submitted that this suit is pre-mature and/or the right is yet to accrue. The Respondent's counsel anchored this submission on the provisions of section 37(3) of the Act. Determining this question involves merits. It is sufficient to point that it casts a serious doubt on whether the *ex parte* applicant has demonstrated that the Respondent has a legal duty to act under such circumstances.

27. Additionally, the provisions of section 36 of the Act cited by the *ex parte* applicant will have to be brought into view and its relevancy to this case determined. Again, this casts a thick cloud on the question whether the test of the existence of a legal right has been satisfied. The section provides that "the Corporation may, where it deems it necessary, withhold payment to a third party in respect of any deposit with an institution until it has received an assignment in writing of all the rights and interests of the depositor in relation to the deposit."

28. Also relevant is section 33(7) of the Act which provides that "the Corporation shall offset and withhold payment of such portion of the insured deposit of any depositor in an institution against any loans or debts due and owing by that depositor to the institution or against any claims for injuries or losses through negligence or other wrongdoing against any depositor who may be liable to the institution or the Corporation as a director, shareholder, officer, employee, agent or other person." The implication of this section is a matter that warrants interrogation by the court.

29. It is evident that one cannot talk of refusal to pay when such legal issues are yet to be settled. It was a serious error for the *ex parte* applicant to ignore the above provisions and invoke Judicial Review jurisdiction, and, pray for orders or **Mandamus** without ensuring that the above conditions are satisfied.

30. The other test is "an express refusal, or an implied refusal through unreasonable delay. I am unable to conclude that there was an express or implied refusal in view of the above provisions. Differently stated, none of the above conditions has been satisfied for *Mandamus* to issue. Lastly, *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has not satisfied the above conditions. It follows that there is no basis at all for the court to grant the order of *Mandamus*.

31. More fundamental is the fact that the issues raised in this touch on the merits of the *ex parte* applicant's case and require the court to take evidence before it can decide which is outside the province of Judicial Review jurisdiction. Whether the *ex parte* applicant signed the guarantee is truly a contested issue of fact which requires evidence to determine. Whether the document in question was a guarantee is a contested issue which requires evidence to prove. The legal effect (if any) also requires to be determined. Determining the above issues will involve a merit review, a function which is outside the purview of judicial Review jurisdiction. Also, whether a Deed of Guarantee existed or not is a contested issue which calls for evidence to be resolved.

32. Additionally, the court is being invited to determine whether the said document was a guarantee. Also, it will require the court to determine the intention of the parties. The *ex parte* applicant's counsel correctly submitted that the question of whether the document was a guarantee cannot be determined in this Judicial Review application. The reverse is true. The *ex parte* applicant's case cannot be determined by way of Judicial Review.

33. More fundamental is the fact that the *ex parte* applicant seeks drastic Judicial Review orders of *Mandamus* which has the effect of determining liability against the Respondent and pronounce final judgment in a contested liquidated claim without hearing evidence. This is outside the function of Judicial Review. Judicial review is concerned with the decision making process and not merits. In *Republic vs Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*^[14] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.^[15] The issues raised in this case can only be determined in a forum where the litigating parties have an opportunity to present their evidence and also test the evidence of their opponents by way of cross examination.

34. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

35. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.* These two tests have not been established in this case. In my view, this is not a Judicial Review case but a civil dispute which ought to have been filed in the Commercial Division.

36. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for Judicial Review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

37. In this case, compelling the Respondent to release deposits when the basic legal requirements are in doubt would in my view amount to impeding its mandate or directing it to act illegally. Further, as stated above, the *ex parte* applicant had the option of filing a civil suit instead of invoking Judicial Review jurisdiction of this Court.

38. In view of my analysis of the law and the determination of the questions raised herein above, the conclusion becomes irresistible that this is not a proper case for Judicial Review orders of *Mandamus* to issue. Accordingly, I find and hold that the *ex parte* Applicant's Application dated 3rd August 2017 must fail. Consequently, I hereby dismiss the application dated 3rd March 2017 with costs to the Respondent.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 17th day of **January**, 2019.

John M. Mativo

Judge.

[1] Act No. 10 of 2012.

[2] Cap 22, Laws of Kenya.

[3] 4th Ed. 2001.

[4] {2015}eKLR.

[5] Citing *Kenya Planters Co-operative Union Limited v Stephen Nyaga Kimani* {2005} eKLR.

[6] Act No. 4 of 2015.

[7] Citing *Republic v Attorney General & Another ex parte Ongata Works Limited* {2016}eKLR.

[8] Citing *Walsh v Lonsdale* {1882} 21 Ch D 9.

[9] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[10]W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[11] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[12] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[13] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).

[14] {2016}eKLR.

[15] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.